MALAYAN BANKING BHD & ORS v. THO SIEW WAH & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
ABANG ISKANDAR JCA
NALLINI PATHMANATHAN JCA
[CIVIL APPEALS NO: B-01(NCVC)(W)-56-02-2015 &
B-01(NCVC)(W)-82-03-2015]
24 JANUARY 2017

LAND LAW: *Sale of land – Indefeasibility of title and interests – Registrar of Land Titles – Transfer of land – Issuance of replacement issue document of title – Impostor collected new title over land from Registrar of Titles – Registered proprietor discovered land transferred to first and second defendants – Land subsequently charged to bank as security for loan – Whether Registrar of Titles negligent in dealing with title deed – Whether such negligence facilitated fraudulent transfer of land – Whether first and second defendants acquired indefeasible title and interest over land – Whether first and second defendants entitled to claim contribution and/or indemnity from Registrar of Titles – Whether bank acquired indefeasible title and interest over land – Whether bank entitled to claim contribution and/or indemnity from Registrar of Titles*

PUBLIC LAW: *Public authorities – Registrar of Land Titles – Transfer of land – Issuance of replacement issue document of title – Whether proper investigation conducted before issuance of replacement title – Whether actual landowner in possession of original issue document of title – Whether actual landowner suffered losses due to issuance of replacement title – Whether relevant authorities liable – Government Proceedings Act 1956, ss. 5 & 6*

Tho Siew Wah ('the plaintiff') was an initial registered proprietor of a land ('the said land'). The plaintiff purchased the said land on 23 August 2005 and had at all material times the physical possession of the original title deed ('old title deed') since 12 April 2006. The old title deed to the land was cancelled by the Pendaftar Hakmilik Negeri Selangor, ('the Registrar of Titles, Selangor') as a result of a re-delineation of boundary exercise. In June 2006, a new title over the land was issued. It was later collected by a person impersonating as the plaintiff, from the Registrar of Titles, Selangor's Office. Sometime around February 2012, pursuant to a land search, the plaintiff found out that the land had been transferred to one Cheah Tai Seng ('the first defendant') and Mohd Zawawi bin Abdullah ('the second defendant') using a new title. At the request of the first and second defendants, Malayan Banking Berhad ('the third defendant') granted a term loan to the first and second defendants to part-finance the purchase of the said land. As security for the said term loan, a first legal charge was created by the first and second defendants over the land in favour of the third defendant. The plaintiff testified that she had never sold the land to anybody, including to the first and second defendants. The plaintiff then initiated legal action as a result

thereof. The plaintiff contended that, *inter alia*, the servants or agents of the Registrar of Titles, Selangor had been negligent in the process of issuing the new title as the plaintiff had never received any notification from the Registrar of Titles, Selangor concerning re-delineation of boundary or that a new title deed would be issued for the said property. The plaintiff also contended that the Registrar of Titles, Selangor owed a duty of care to the plaintiff and had been negligent in dealing with the new title deed. The plaintiff thus claimed, among others, for a declaration that (i) the transfer of the land to the first and second defendants was null and void; (ii) for an order for the Registrar of Titles, Selangor to cancel the entries or memorial in the registry of land title which were made in favour of the first and second defendants; (iii) damages against the Registrar of Titles, Selangor; and (iv) a declaration that the charge over the said land in favour of the third defendant was null and void. On the other hand, the first, second and third defendants *vide* notice claiming contribution or indemnity claimed against the Registrar of Titles, Selangor to be fully indemnified for all losses and damages suffered which may be awarded against them. The High Court Judge allowed the plaintiff's claims in part and dismissed the first, second and third defendants' claims for contribution against the Registrar of Titles, Selangor. Aggrieved, the first and second defendants filed an appeal to the Court of Appeal *vide* Appeal No. B-01(NCVC)(W)-56-02-2015 ('second and third defendants' appeal'). The third defendant had also filed an appeal *vide* Appeal No. B-01(NCVC)(W)-82-03-2015 ('third defendant's appeal'). At the outset, the Registrar of Titles, Selangor raised a preliminary objection premised on the contention that as the action against the Registrar of Titles, Selangor was essentially an action in tort against the Government, then the provisions of ss. 5 and 6 of the Government Proceedings Act 1956 ('GPA') ought to apply. That being the case, the actual tortfeasor of the negligent act must be named. Since the actual tortfeasor was not named, it was argued that the court lacked jurisdiction to hear the present appeal against the Registrar of Titles, Selangor. The issues that arose for the court's determination, *inter alia*, were (i) whether the first and second defendants acquired an indefeasible title as *bona fide* purchasers; (ii) whether the first and second defendants were entitled to claim contribution and/or indemnity from the Registrar of Titles, Selangor; (iii) whether the third defendant as a subsequent purchaser, was a *bona fide* purchaser for value without notice; and (iv) whether the third defendant was entitled to claim contribution and/or indemnity from the Registrar of Titles, Selangor.

Held (dismissing first and second defendants' appeal; allowing third defendant's appeal in part)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) The provisions of the GPA do not apply in this case. This is because the National Land Code ('NLC') makes specific provisions as to the correct party to be sued in s. 12 of the NLC. Looking at how the statement of claim is couched, this is an action against the officer appointed as the

A Registrar of Titles, an office and appointment made by the State Authority under s. 12(1)(a) of the NLC. According to sub-s. (4) to s. 12 of the NLC, 'The State Director, the Registrar and every Land Administrator, shall each have a seal of office, and every instrument purporting to bear any such seal, and to have been signed by or on behalf B of the officer in question shall, unless the contrary be proved, be deemed to have been sealed and signed by him or at his direction'. In this case, the Registrar of Titles, Selangor was the Registrar of Titles where the subject land was situated and where the land officers issuing and registering the land titles were working at the material time. Therefore, C the Registrar of Titles, Selangor is the correct party to be sued. The preliminary point is therefore dismissed. (paras 28, 30, 32 & 35)

(2) According to the case of *Tan Ying Hong v. Tan Sian San & Ors* an immediate purchaser of a title obtained fraudulently or through a void or insufficient instrument does not acquire an indefeasible title. In the D instant case, the first and second defendants were the immediate purchasers. As such, their title was defeasible and was liable to be set aside by the original owner. Therefore, the issue of the first and second defendants being *bona fide* was irrelevant. As long as the registration pursuant to the immediate purchase of the land was obtained through E forgery or the use of a void or insufficient instrument, no indefeasibility of title was conferred by law under the NLC, whether or not the purchasers were privy to the vitiating acts mentioned under s. 340(2) of the NLC. Therefore, the second and third defendants' appeal against the plaintiff was dismissed and the order of the High Court that the names of the first and second defendants be removed from the land title of the F plaintiff was affirmed. (paras 37, 38 & 40)

(3) The plaintiff's land that was registered in the first and second defendants' names was defeasible on account of s. 340(2) of the NLC. It did not matter whether they were not privy to the forgery because they were immediate purchasers, therefore not protected under the proviso to G s. 340(3). Further, the conduct of the first and second defendants showed that they had been involved in acts that bordered on illegality. The maxim of *ex turpi causa* applied against the first and second defendants such that their claim for contribution or indemnity against the Registrar of Titles, Selangor could not be sustained. As such, the first and second H defendants' appeal must be dismissed with costs and the first and second defendants' names must be deleted from the register of titles and the name of the plaintiff should be reinstated on the same land title. (paras 48-51)

I **(4)** The third defendant had left it entirely to its lawyers to do the preparation of the transfer and charge documents. As the lawyer for the third defendant who had submitted the documents pertaining to the registrations of the transfer and the charge to the Land Registry, it was the lawyer's duty to check and verify the accuracy of the particulars

contained in the documents. It turned out that the certificate number assigned was a fake number and the *ad volarem* stamp duty had not been paid at all for the transfer. Had the lawyer conducted a check, the red flag surrounding the transaction would have been raised and the registration could be aborted pending further inquiry. A failure by the lawyer was a failure of the third defendant. Therefore, the third defendant was not a *bona fide* purchaser for value. As such, the charge it had created over the land was therefore void and of no effect. Consequently, it should be cancelled. (paras 68, 72, 74 & 75)

(5) Although the third defendant was not a *bona fide* purchaser, it did not follow *ipso facto* that they are precluded from making a claim for an indemnity/contribution from the Registrar of Titles on the basis of negligence. The third defendant's lawyer's negligence was insufficient to amount to illegal, unlawful or wrongful conduct falling within maxim of *lex turpi causa non oritur* action. There was a total failure on the part of the Registrar of Titles, Selangor to comply with the procedure and regulation relating to the cancellation of the old title and issuance of the new title as required under s. 90 of NLC. Therefore, the third defendant's appeal in respect of its claim for an indemnity and/or contribution against the Registrar of Titles, Selangor was allowed. (paras 78, 79 & 80)

Bahasa Malaysia *Headnotes*

Tho Siew Wah ('plaintif') adalah pemilik berdaftar terdahulu sebidang tanah ('tanah tersebut'). Plaintif telah membeli tanah tersebut pada 23 Ogos 2005 dan pada masa yang material, telah memiliki secara fizikal surat hak milik ('surat-surat hak milik lama') sejak 12 April 2006. Hak milik lama ke atas tanah tersebut telah dibatalkan oleh Pendaftar Hakmilik Negeri Selangor akibat pengubahan semula sempadan. Pada bulan Jun 2006, satu hak milik baru ke atas tanah tersebut telah dikeluarkan. Ia kemudiannya diambil oleh orang yang menyamar sebagai plaintif, dari Pejabat Pendaftar Hakmilik, Selangor. Pada sekitar Februari 2012, berikutan satu carian tanah, plaintif mendapati bahawa tanah tersebut telah dipindahkan kepada seorang bernama Cheah Tai Seng ('defendan pertama') dan Mohd Zawawi bin Abdullah ('defendan kedua') menggunakan hak milik baru. Atas permintaan defendan pertama dan kedua, Malayan Banking Berhad ('defendan ketiga') telah memberikan pinjaman berjangka kepada defendan pertama dan kedua untuk membiayai sebahagian pembelian tanah tersebut. Sebagai cagaran kepada pinjaman tersebut, suatu pajakan telah dibuat oleh defendan pertama dan kedua ke atas tanah tersebut yang memihak kepada defendan ketiga. Plaintif memberi keterangan bahawa dia tidak pernah menjual tanah tersebut kepada sesiapa pun, termasuk defendan pertama dan kedua. Plaintif kemudiannya memulakan tindakan undang-undang. Plaintif menghujahkan, antara lain, bahawa pekerja-pekerja atau agen Pendaftar Hakmilik, Selangor cuai dalam proses mengeluarkan hak milik baru kerana plaintif tidak pernah menerima

apa-apa pemberitahuan daripada Pendaftar Hakmilik, Selangor berhubung dengan pengubahan semula sempadan atau bahawa satu hak milik baru akan dikeluarkan untuk harta tersebut. Plaintif juga menghujahkan bahawa Pendaftar Hakmilik, Selangor mempunyai tanggungjawab berhati-hati terhadap plaintif dan telah cuai dalam mengendalikan surat hak milik yang baru. Oleh itu, plaintif menuntut, antara lain, untuk perisytiharan bahawa (i) pemindahan tanah kepada defendan pertama dan kedua adalah batal dan tidak sah; (ii) bagi perintah Pendaftar Hakmilik, Selangor untuk membatalkan penyertaan atau memorial dalam pendaftaran hak milik tanah yang dibuat atas nama defendan pertama dan kedua; (iii) ganti rugi terhadap Pendaftar Hakmilik, Selangor; dan (iv) perisytiharan bahawa pajakan atas tanah tersebut yang memihak kepada defendan ketiga adalah batal dan tidak sah. Sebaliknya, defendan pertama, kedua dan ketiga melalui notis menuntut sumbangan atau indemniti terhadap Pendaftar Hakmilik, Selangor untuk ditanggung rugi secara sepenuhnya untuk semua kerugian dan kerosakan yang mungkin dialami oleh mereka. Hakim Mahkamah Tinggi membenarkan sebahagian tuntutan plaintif dan menolak tuntutan defendan pertama, kedua dan ketiga untuk sumbangan terhadap Pendaftar Hakmilik, Selangor. Terkilan, defendan pertama dan kedua merayu ke Mahkamah Rayuan melalui Rayuan No. B-01 (NCVC)(W) -56-02-2015 ('rayuan defendan kedua dan ketiga'). Defendan ketiga, juga telah merayu melalui Rayuan No. B-01 (NCVC)(W)-82-03-2015 ('rayuan defendan ketiga'). Pada permulaannya, Pendaftar Hakmilik, Selangor membangkitkan bantahan awal berdasarkan oleh kerana tindakan terhadap Pendaftar Hakmilik, Selangor pada dasarnya adalah tindakan dalam tort terhadap Kerajaan, maka peruntukan-peruntukan ss. 5 dan 6 Akta Prosiding Kerajaan 1956 ('GPA') adalah terpakai. Oleh itu, pelaku tort sebenar yang melakukan perbuatan cuai mesti dinamakan. Oleh kerana pelaku tort sebenar tidak dinamakan, adalah dihujahkan bahawa mahkamah tidak mempunyai bidang kuasa untuk mendengar rayuan sekarang terhadap Pendaftar Hakmilik, Selangor. Isu-isu yang dibangkitkan untuk pertimbangan mahkamah, antara lain, adalah (i) sama ada defendan pertama dan kedua telah memperoleh hak milik tak boleh sangkal bagi hartanah tersebut sebagai pembeli *bona fide*; (ii) sama ada defendan pertama dan kedua berhak menuntut sumbangan dan/atau tanggung rugi daripada Pendaftar Hakmilik, Selangor; (iii) sama ada defendan ketiga sebagai pembeli berikutnya, adalah pembeli *bona fide* untuk nilai tanpa notis; dan (iv) sama ada defendan ketiga berhak menuntut sumbangan dan/atau tanggung rugi daripada Pendaftar Hakmilik, Selangor.

Diputuskan (menolak rayuan defendan pertama dan kedua; membenarkan sebahagian rayuan defendan ketiga)

Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Peruntukan GPA tidak terpakai dalam kes ini. Ini adalah kerana Kanun Tanah Negara ('NLC') membuat peruntukan khusus mengenai pihak yang betul untuk disaman dalam s. 12 NLC. Berdasarkan cara penyataan tuntutan dibuat, ini adalah tindakan terhadap pegawai yang dilantik

sebagai Pendaftar Hakmilik, sebuah pejabat dan pelantikan yang dibuat oleh Pihak Berkuasa Negeri di bawah s. 12(1)(a) NLC. Menurut sub-s. (4) kepada s. 12 NLC, 'The State Director, the Registrar and every Land Administrator, shall each have a seal of office, and every instrument purporting to bear any such seal, and to have been signed by or on behalf of the officer in question shall, unless the contrary be proved, be deemed to have been sealed and signed by him or at his direction'. Dalam kes ini, Pendaftar Hakmilik, Selangor adalah Pendaftar Hakmilik di mana tanah subjek tersebut terletak dan di mana Pegawai Tanah mengeluarkan dan mendaftarkan hak milik tanah bekerja pada waktu yang material. Oleh itu, Pendaftar Hakmilik, Selangor adalah pihak yang betul untuk disaman. Oleh itu, bantahan awal adalah dibatalkan.

(2) Berdasarkan kes *Tan Ying Hong v. Tan Sian San & Ors,* seorang pembeli terus hak milik yang diperolehi secara frod atau melalui instrumen terbatal atau tidak sah tidak memperolehi hak milik yang tidak boleh disangkal. Dalam kes ini, defendan pertama dan kedua adalah pembeli terus. Oleh itu, hak milik mereka boleh disangkal dan boleh diketepikan oleh pemilik asal. Justeru, isu bahawa defendan pertama dan kedua adalah *bona fide* tidak relevan. Selagi pendaftaran menurut pembelian terus tanah diperolehi melalui pemalsuan atau penggunaan instrumen-instrumen terbatal atau tidak sah, tiada hak milik yang tidak boleh disangkal boleh diberikan menurut undang-undang di bawah NLC, sama ada pembeli tersebut telah terlibat dalam perbuatan yang disebutkan di bawah s. 340(2) NLC. Oleh itu, rayuan defendan kedua dan ketiga terhadap plaintif ditolak dan perintah Mahkamah Tinggi bahawa nama-nama defendan pertama dan kedua dikeluarkan daripada hak milik tanah dan digantikan dengan nama plaintif disahkan.

(3) Tanah plaintif yang didaftarkan dengan nama-nama defendan pertama dan kedua boleh disangkal menurut s. 340(2) NLC. Tidak kira sama ada mereka tidak terlibat dengan pemalsuan tersebut kerana mereka pembeli terus, oleh itu tidak dilindungi di bawah proviso s. 340(3) NLC. Selanjutnya, tindakan defendan pertama dan kedua menunjukkan bahawa mereka telah terlibat dalam perbuatan yang menyalahi undang-undang. Maxim *ex turpi causa* terpakai terhadap defendan pertama dan kedua, berikutannya tuntutan defendan pertama dan kedua terhadap Pendaftar Hakmilik, Selangor tidak dapat dikekalkan. Oleh itu, rayuan mereka harus ditolak dengan kos dan nama-nama defendan pertama dan kedua harus dipadamkan dari daftar hak milik dan nama plaintif harus dikembalikan semula ke atas hak milik tanah yang sama.

(4) Defendan ketiga telah meninggalkan sepenuhnya kepada peguamnya untuk melakukan penyediaan pemindahan dan dokumen pajakan. Sebagai peguam untuk defendan ketiga yang telah mengemukakan dokumen yang berkaitan dengan pendaftaran pemindahan dan pajakan

ke Pejabat Pendaftaran Tanah, adalah tugas peguam, untuk memeriksa dan mengesahkan ketepatan butir-butir yang terdapat dalam dokumen tersebut. Ternyata nombor sijil yang diberikan adalah nombor palsu dan duti setem *ad volarem* tidak dibayar sama sekali untuk pemindahan tersebut. Sekiranya peguam menjalankan pemeriksaan dengan betul, kesulitan yang mengelilingi urus niaga tersebut akan dibangkitkan dan pendaftaran tersebut boleh ditangguhkan sementara menunggu siasatan lanjut. Kegagalan peguam adalah kegagalan defendan ketiga. Oleh itu, defendan ketiga bukanlah pembeli *bona fide* untuk nilai. Justeru, pajakan yang telah dibuat ke atas tanah tersebut tidak sah dan tiada kesan. Oleh itu, ia perlu dibatalkan.

(5) Walaupun defendan ketiga bukan pembeli *bona fide*, ia tidak mengikuti secara *ipso facto* bahawa mereka dihalang daripada membuat tuntutan untuk indemniti/sumbangan dari pendaftar hak milik atas dasar kecuaian. Kecuaian peguam defendan ketiga tidak mencukupi untuk terjumlah kepada perbuatan yang menyalahi undang-undang, tidak sah dan salah yang terangkum dalam maxim *lex turpi causa non oritur action*. Terdapat kegagalan pada pihak Pendaftar Hakmilik, Selangor untuk mematuhi prosedur dan peraturan berkaitan dengan pembatalan hak milik lama dan pengeluaran hak milik baru seperti yang dikehendaki di bawah s. 90 NLC. Oleh itu, rayuan defendan ketiga berhubung tuntutannya untuk mendapatkan ganti rugi dan/atau sumbangan terhadap Pendaftar Hakmilik, Selangor dibenarkan.

Case(s) referred to:

Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***

Doshi v. Yeoh Teong Lay [1974] 1 LNS 30 FC ***(refd)***

Government of the State of Negeri Sembilan v. Yap Chong Lan & Ors And Another Case [1984] 2 CLJ 150; [1984] 1 CLJ (Rep) 144 FC ***(refd)***

Government of the State of Sabah v. Syarikat Raspand [2010] 7 CLJ 945 CA ***(refd)***

Heveaplast Marketing Sdn Bhd v. See Leong Chye & Ors And Other Appeals [2017] 2 CLJ 43 CA ***(refd)***

Holman v. Johnson (1775) 1 Cowp 341 ***(refd)***

Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***

Kumpulan Perubatan (Johor) Sdn Bhd v. Dr Mohd Adnan Sulaiman & Anor [2015] 1 CLJ 471 CA ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***

Ministry of Housing and Local Government v. Sharp and Another [1970] 2 QB 223 ***(refd)***

Oliver v. Hinton [1899] 2 Ch D 264 ***(refd)***

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Legislation referred to:

Government Proceedings Act 1956, ss. 5, 6

National Land Code, ss. 12(1)(a), (4), 90, 340(2)(b), (3)

(Civil Appeal No: B-01(NCVC)(W)-56-02-2015)
For the 1st appellant - Yoong Sin Min, Ng Hooi Huang & Chiok Li Wei; M/s Shook Lin & Bok
For the 2nd & 3rd appellants - Ong Swee Leong & Yap Zhen Jun; M/s Armiy Rais
For the 1st respondent - Chin Yin Choi & Lee Soon Khean; M/s Kenny Lee & Assocs
For the 2nd respondent - Ahmad Fuad Othman & Salwati Umar; State Legal Advisor, Selangor

(Civil Appeal No: B-01(NCVC)(W)-82-03-2015)
For the appellant - Yoong Sin Min, Ng Hooi Huang & Chiok Li Wei; M/s Shook Lin & Bok
For the 1st respondent - Chin Yin Choi & Lee Soon Khean; M/s Kenny Lee & Co
For the 2nd & 3rd respondents - Ong Swee Leong & Yap Zhen Jun; M/s Armiy Rais
For the 4th respondent - Ahmad Fuad Othman & Salwati Umar; State Legal Advisor, Selangor

[Editor's note: Appeal from High Court, Shah Alam; Civil Suit No: 22NCVC-635-05-2012 (varied).]

Reported by Sandra Gabriel

JUDGMENT

Abang Iskandar JCA:

Brief Facts Of The Case

[1] Tho Siew Wah ("the plaintiff") was the initial registered proprietor of the land held under Geran Hakmilik No 100855, Lot No. 8591, Mukim Dengkil, Daerah Sepang, Negeri Selangor ("the land"). She purchased the land on 23 August 2005 and had at all material times the physical possession of the original title deed ("old title deed") right from the time when she received the same from her lawyer after the land was registered in her name, as far back as 12 April 2006.

[2] The old title to the land was cancelled by the fourth defendant, Pendaftar Hakmilik Negeri Selangor, ("the Registrar of Titles, Selangor") as a result of a re-delineation of boundary exercise. On 14 June 2006, a new title over the land was issued. It was later collected by a person impersonating as the plaintiff, from the Registrar of Titles, Selangor's office. The Registrar of Titles, Selangor admitted that there was no notice given to the plaintiff of a new title having been issued and that there was no notice sent to the plaintiff requiring the old title to be surrendered by the plaintiff.

[3] Sometime around February 2012, it came to the plaintiff's attention that some people had come to view the land as if they were interested in purchasing the land. As the plaintiff never intended to sell the land, she became suspicious and proceeded to carry out a land search in the Registrar of Titles, Selangor's office on 23 February 2012.

[4] From the land search that was conducted, the plaintiff found out that the land had been transferred to one Cheah Tai Seng ("the first defendant") and Mohd Zawawi bin Abdullah ("the second defendant") on 28 July 2011 using the new title.

[5] The plaintiff also discovered that the land was sold by an individual using her full name and identification card number ("the fake seller") to the first and second defendants, purportedly for a consideration of RM4,500,000. The transfer form, form 14A, dated 21 June 2011 was executed by the fake seller, on one side, and the first and second defendants on the other side. The plaintiff testified that she had never sold the land to anybody, including to the first and second defendants and that she had never parted with her old title deed ever since she obtained it after she had purchased the land.

[6] At the request of the first and second defendants, Malayan Banking Berhad ("the third defendant") had granted a term loan of RM2,250,000 to the first and second defendants to part-finance the purchase of the land. The security for the said term loan was the first legal charge created by the first and second defendants over the land in favour of the third defendant.

[7] The plaintiff then initiated legal action as a result thereof. The plaintiff contended that, *inter alia*, the servants or agents of the Registrar of Titles, Selangor had been negligent in the process of issuing a new title as the plaintiff had never received any notification from the Registrar of Titles, Selangor concerning re-delineation of boundary or that a new title deed would be issued for the said property. The plaintiff also contended that the Registrar of Titles, Selangor owed a duty of care to the plaintiff and had been negligent in dealing with the title deed concerning the land and such negligence had facilitated the fraudulent transfer of the land into the first and second defendants' names.

The Plaintiff's Claims Against The Defendants

[8] The plaintiff had sued four parties in her legal suit in respect of the land. In the Shah Alam High Court, the plaintiff had claimed, among others, for a declaration that the transfer of the land to the first and second defendants was null and void, and for an order for the Registrar of Titles, Selangor to cancel the entries or memorial in the registry of land title which was made in favour of the first and second defendants. She had also prayed for damages against the Registrar of Titles, Selangor. The plaintiff had also prayed for a declaration that the charge over the land in favour of the third defendant was null and void.

[9] On the other hand, the first and second defendants *vide* notice claiming contribution or indemnity dated 9 October 2012 had claimed against the Registrar of Titles, Selangor to be fully indemnified for all losses suffered by the first and second defendants and damages which may be awarded against

them, in the event the transfer of the land in favour of the first and second defendants was declared null and void. Earlier, the third defendant also applied for a similar contribution against the Registrar of Titles, Selangor *vide* notice claiming contribution or indemnity which was dated 9 August 2012.

Decision Of The High Court Judge

[10] The learned High Court Judge had, on 23 January 2015 allowed the plaintiff's claims, except the claims for damages against the first, second defendants and the Registrar of Titles, Selangor, and dismissed the first, second, and third defendants' claims for contribution against the Registrar of Titles, Selangor, thus accounting for these appeals before us filed by the first, second, and third defendants. There was no appeal filed by the plaintiff. Specifically, the High Court, *inter alia*, had ordered the following:

(a) the transfer of the land in favour of the first and second defendants (the immediate purchasers) be declared null and void and be cancelled;

(b) the original issue document of title to the land be delivered to the plaintiff (Tho Siew Wah);

(c) the charge over the land in favour of the third defendant (the bank) registered under Presentation No. 76131/2011 be declared null and void and be cancelled;

(d) the Registrar of Titles, Selangor to cancel or cause for the cancellation of the registration of the transfer of the land in favour of the first and second defendants and also the charge over the land in favour of the third defendant, and to reinstate the plaintiff as the registered proprietor of the land; and

(e) Costs in the sum of RM70,000 to be paid by the appellants.

The Appeals

[11] Aggrieved with such decision, the first and second defendants (the immediate purchasers) filed an appeal to the Court of Appeal *vide* Civil Appeal No. B-01(NCVC)(W)-56-02-2015. The third defendant (the bank), had also filed an appeal *vide* Civil Appeal No. B-01(NCVC)(W)-83-03-2015 against the adverse orders of the High Court.

[12] We had the opportunity to hear all parties and we reserved the decision for deliberation. Essentially, these appeals were appeals against the decision of learned High Court Judge in allowing the plaintiff's claim against the first, second, and third defendants and the dismissal of the notices for contribution and/or indemnity filed by the first, second and third defendants against the Registrar of Titles, Selangor. This is our decisions and the grounds of our decision.

[13] In our grounds of judgment, parties are referred to as they were referred to in the High Court.

Preliminary Objection By The Registrar of Titles, Selangor

[14] Before us, during submissions, learned Federal Counsel for the Registrar of Titles, Selangor raised a preliminary objection on the issue of non-compliance with the provisions of the Government Proceedings Act 1956 (the GPA 1956) by the adverse parties. In the event that his submission on GPA issue did not hold water, then it was submitted before us that the factual matrix in this case did not establish any negligence on the part of the Registrar of Titles, Selangor.

[15] Needless to say, all the adverse parties had objected to this preliminary objection raised by the Registrar of Titles, Selangor. They had all protested that this issue was never pleaded in the defence nor was it canvassed before the trial judge in the court below.

[16] Having considered the respective submissions, we were of the view that as this matter related to a point of law, we had proceeded to hear out the Registrar of Titles, Selangor and we had also allowed all the defendants to answer to the same in reply, respectively. We agreed with Encik Ahmad Fuad, the learned Federal Counsel, that on the authority of the case of *Kumpulan Perubatan (Johor) Sdn Bhd v. Dr Mohd Adnan Sulaiman & Anor* [2015] 1 CLJ 471 this court ought to allow submissions be heard on a matter that was essentially a point of law, though it was never taken up earlier before the trial court. This court in *Kumpulan Perubatan (Johor) Sdn Bhd* case (*supra*) had cited the case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520 in support thereof, when it said:

> These grounds were essentially issues of law that did not require the adduction of additional evidence beyond what had already been received during trial. We therefore agreed with the appellant's argument that these were fundamental issues of law on admitted facts that were not in controversy. It was within this court's discretion to allow the submissions in the interest of justice, bearing in mind the facts and the circumstances of the case.

[17] The preliminary objection was premised on the contention that as the action against the Registrar of Titles, Selangor was essentially an action in tort (being founded in the tort of negligence) against the Government, then the provisions of ss. 5 and 6 of the GPA 1956 ought to apply accordingly. That being the case, the actual tortfeasor of the negligent act must be named. Only if liability is established against the tortfeasor, being the agent, will the Government be vicariously liable.

Liability of the Government in tort

5. Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

Limits of liability of the Government

6. (1) No proceedings shall lie against the Government by virtue of Section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

[18] In the Court of Appeal decision in *Government of the State of Sabah v. Syarikat Raspand* [2010] 7 CLJ 945, Low Hop Bing JCA outlined the application of the said ss. 5 and 6 of the GPA as follows:

(36) Section 6 expressly prohibits the bringing of any proceedings against the Government for damages under s. 5 unless the action for such wrongful act, neglect or default would have lain against the officer personally. This is a substantive provision that goes to the jurisdiction of the Court. Liability can only be attributed to the Government where the officer's act, neglect or default is proved to have established the liability of the officer personally. In the absence of the officer's liability, (which can only arise and bind the officer(s) if and when the officer or officers are cited as defendants), no proceedings shall lie against the Government. Where no such proceedings could lie against the Government, the court is in no position to exercise any jurisdiction in relation thereto.

[19] So the question was postulated by the learned Federal Counsel as to whether the Registrar of Titles, Selangor as named, was the actual tortfeasor in this case? Or must the actual tortfeasor be named and be proven to be liable before vicarious liability can be attached to the Government?

[20] Learned Federal Counsel also cited the Federal Court case of *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663, where it was held by the apex court that the Government itself does not commit a tort but that it becomes vicariously liable for acts or omissions committed by its servants in the course of discharging their duties on its behalf. As such, the failure to name the actual tortfeasor employee and just by naming the Government in such an action, was therefore fatal to the claimant's case. The view of the apex court was expressed as follows:

(16) Thus, I entirely agree with the views expressed by Abdul Aziz J (later FJ) in *Haji Abdul Rahman*, *supra*. Contrary to the finding of the Court of Appeal, *Haji Abdul Rahman* was correctly decided and should be upheld. Therefore, on the proper construction of ss. 5 and 6 of Act 359, in any

A claim in tort against the Government, the officer of the Government who was responsible for the alleged tortious act must be made a party and his liability be established before the Government can be made liable vicariously as principal. It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needs to be established. It is only upon a successful claim against the
B officer personally can a claim be laid against the Government.

(17) In the present case, all the eight causes of actions are actions in tort or tort-based premised on the act or omission of an individual. None of the Governments sued is capable of committing the wrong pleaded. Since the Governments' liability in tort can only be vicarious by virtue of ss. 5
C and 6 of Act 359, and as the officers who were responsible for the alleged wrongdoing were not joined as defendants to the action, it is therefore not possible in law to maintain a successful claim in tort against the Governments as primary tortfeasors. That being so, the appellants' application to strike out the respondents' actions is meritorious.

D **[21]** Learned Federal Counsel went on to submit that the failure to name the actual tortfeasor must be a fatal omission. He submitted that it was a matter that went to the jurisdiction of the court. He had cited the case of *Syarikat Raspand (supra)* in support of such proposition where learned Justice Low Hop Bing JCA had ruled that the court had no jurisdiction, in the event
E that ss. 5 and 6 of the GPA 1956 were not complied with. Learned Justice Low had said in the *Syarikat Raspand* case *(supra)* as follows:

(40) Reverting to the instant appeal we note that the alleged tortfeasors *viz* the Government servants or officers had not been stated as defendants. This omission on the part of the plaintiff has resulted in the failure to satisfy the requirements of ss. 5 and 6. That being the position,
F no proceedings shall lie against the Government ie, the defendant herein, and consequentially, the High Court could not exercise jurisdiction in relation thereto.

[22] Mindful of the authorities on this matter, we allowed the fourth respondent to proceed with his preliminary objection.

G

[23] Looking at the parties named in this instance appeal, it was argued by Federal Counsel that the actual tortfeasor was not named as such. As a result of that, it was his contention that this court lacked the necessary jurisdiction to hear this appeal against the Registrar of Titles, Selangor.

H **[24]** Learned counsel for the first and second defendants (the immediate purchasers) and the third defendant (the bank) submitted that the argument that was advanced in the preliminary objection by the Registrar of Titles, Selangor was a flawed one, for the simple reason that the cause of action in this case was not proceeded against the Government, be it the Federal or
I State Government. As such, the question of naming the actual tortfeasor does not arise.

[25] Having considered the submissions by all parties, with respect, we see nothing in those cases cited by the learned Federal Counsel which could assist his cause.

[26] Really, the answer to this issue lies in the provisions as contained in the National Land Code. In particular s. 12 of the NLC which provides, as follows:

12 State Director and other State Officers

(1) The State Authority may appoint for the State-

(a) a State Director of Lands and Mines, a Registrar of Titles and a Director of Survey and Mapping;

(b) so many Deputy Directors of Lands and Mines, Assistant Directors of Lands and Mines, Deputy Registrars of Titles, Deputy Directors of Survey and Mapping, District Land Administrators, Assistant District Land Administrators, Survey Officers, Settlement Officers and other officers as the State Authority may consider necessary for the purpose of this Act.

(2) The State Authority may define the districts, sub-districts and other areas in which any of the officers referred to in paragraph (b) of sub-section (1) may exercise the powers and perform the duties conferred or imposed upon them by or under this Act.

(3) The State Director shall-

(a) be responsible to the State Authority for the due administration within the State of the provisions of this Act;

(b) act in accordance with any direction given to him by the State Authority;

(c) have all the powers conferred upon the Registrar and a Land Administrator by or under this Act;

(d) subject to the direction of the State Authority, exercise general control and supervision over the Registrar, and over all officers (other than Deputy Directors of Survey Mapping and other Survey Officers) referred to in paragraph (b) of sub-section (1).

(4) The State Director, the Registrar and every Land Administrator shall each have a seal of office, and every instrument purporting to bear any such seal, and to have been signed by or on behalf of the officer in question shall, unless the contrary be proved, be deemed to have been sealed and signed by him or at his direction.

(5) Subject to the provisions of sub-section (3), in every district in which there may be one or more Assistant Land Administrators in addition to a Land Administrator, every Assistant Land Administrator shall exercise the powers and perform the duties conferred or imposed upon him by or under this Act in conformity with the directions of the Land Administrator.

[27] In view of the clear provision as contained thereunder, we are of the view that it would be sufficient, for the purpose of making a claim for damages and/or indemnity and contribution, to name the "Pendaftar Hakmilik Negeri Selangor", as the defendant.

[28] Having considered the contentions of both parties, it is our view the provisions of the GPA do not apply in this case. This is because the NLC makes specific provisions as to the correct party to be sued in s. 12 of the NLC. Looking at how the statement of claim is couched, this is an action against the officer appointed as the Registrar of Titles, an office and appointment made by the State Authority, as can be seen under s. 12(1)(a) of the NLC. According to sub-s. (4) to s. 12 of the NLC, "The State Director, **the Registrar** and every Land Administrator, shall each have a seal of office, and every instrument purporting to bear any such seal, and to have been signed by or on behalf of the officer in question shall, unless the contrary be proved, be deemed to have been sealed and signed by him or at his direction. (emphasis added.)

[29] What that means is that any act relating to any instrument that bears the seal or signature of the Registrar or on behalf of the Registrar, is deemed unless the contrary is proven, to be attributable to the Registrar or done in his direction.

[30] In this case, the Registrar of Titles, Selangor was the Registrar of Titles where the subject land was situated and where the land officers issuing and registering the land titles were working at the material time. It was alleged by the first, second, and third defendants that the negligence of the Registrar of Titles, Selangor had caused them to suffer losses. The question that needed to be answered would necessarily be: 'who was to be held liable for such losses and who was to be sued, in the circumstances?'

[31] We reiterate that s. 12 answers that question more than adequately. We as supported in our view by Abdoolcader FJ's judgment in *Government of the State of Negeri Sembilan v. Yap Chong Lan & Ors And Another Case* [1984] 2 CLJ 150; [1984] 1 CLJ (Rep) 144; [1984] 2 MLJ 123 ("*Yap Chong Lan* case") which reads as follows:

> At the inception of the hearing the State Legal Adviser who appeared for the State Government and the Director of Lands and Mines took a preliminary objection to the joinder of the State Government as a party to the proceedings in view of the provisions of section 16(2). The learned Judge deferred his decision on this point until the conclusion of the trial and in his reserved judgment dismissed it on the grounds that 'because of the various declarations sought against it' the State Government 'should be a proper and necessary party and ought to be heard, for the purpose of completely adjudicating on all the issues herein'. We must with respect say that this is a paralogism as it involves the fallacy of *petitio principii*; it begs the question as there can be no question of any relief

being accorded against the State Government if it is not a proper party. The State Government as such has nothing to do with proceedings under the Code. It is the State Authority that is the pertinent entity, and State Authority is defined in section 5 to mean the Ruler or Governor of the State, as the case may be. Section 12(1) provides for the State Authority to appoint a Director of Lands and Mines for the State and sub-section (3) of that section specifies his functions, powers, duties and responsibilities. Section 16 enacts provisions for actions by and against the State Authority, and sub-section (2) thereof specifically stipulates that any action, suit or other proceeding relating to land in which it is sought to establish any liability on the part of the State Authority shall be brought against the Director of Lands and Mines of the State in the name of his office. It is accordingly abundantly clear that the State Government should never have been joined in the proceedings and on the preliminary objection taken it should have been discharged as a party thereto. There appears to be a popular misconception on this aspect of the matter and on the role of the Government of a State as such in relation to the Code with the resultant indiscriminate misjoinder of State Governments as parties in proceedings thereunder, and we expect due heed to be taken of the point we make in this regard.

[32] Therefore, the Registrar of Titles, Selangor is the correct party to be sued. Another English case of relevance is that of *Ministry of Housing and Local Government v. Sharp and Another* [1970] 2 QB 223 ("*Sharp* case").

[33] In this regard, we would refer the judgement of Lord Denning in *Sharp* case (*supra*) where the learned judge had said:

Who, then, is to bear the loss? The negligent clerk can, of course, be made to bear it, if he can be found and is worth the money - which is unlikely. Apart from the clerk himself, there is only one person in law who can be made responsible. It is the registrar. He must answer for the mistakes of the clerk and make compensation for the loss. He is a public officer and comes within the settled principle of English law that, when an official duty is laid on a public officer, by statute or by common law, then he is personally responsible for seeing that the duty is carried out. He may, and often does, get a clerk or minor official, to do the duty for him, but, if so, he is answerable for the transgression of the subordinate: see *Sanderson v. Baker* [1972] 3 Wils 309, 317, where Blackstone J states the position of the sheriff. Sometimes it is an absolute duty, in which case he must see that it is performed absolutely: see the instances given by Holt CJ in *Lane v. Cotton* [1701] 1 Ld Raym 646, 651. At other times, it is only a duty to use due diligence, in which case he must see that due diligence is used: see the celebrated judgment of Best CJ in *Henly v. Lyme Corpn* [1828] 5 Bing 91, 107-109. But, in any event, if the duty is broken, and injury is done thereby to one of the public, then the public officer is answerable. The injured person can sue him in the civil courts for compensation ...

[34] Reverting to our case, the Registrar of Titles is responsible for the acts of the officers under its immediate control in the matter of managing the registration of land titles under its purview at the Land Office Registry in Gombak Land District, Selangor. That is clear from the provisions of s. 12(4) of the NLC. In this case, the Registrar of Titles, Selangor did not notify the plaintiff of the re-delineation although it would directly affect her land. Neither did the Registrar of Titles, Selangor request the plaintiff to surrender her old land title that was in her possession. The surrender of the old land title would enable the Registrar of Titles, Selangor to have it duly destroyed before a new title deed to the land was issued. Again, once, the new title deed to the land was issued, the Registrar of Titles, Selangor would have to notify the plaintiff to collect the same from the land office. The witness for the Registrar of Titles, Selangor was not able to confirm from the records kept by their office whether the plaintiff was ever notified to collect the new title deed to her land. Neither did they know the identity of the person who had collected the new title deed from the Land Office Registry. It was however not disputed that the plaintiff never collected the new land title deed as she was in possession of the old title deed at all material times. It was no surprise then that the Registrar of Titles, Selangor admitted that someone had come to their office to collect the new title deed to the land and that the new title to the land was indeed released to that person. That the Registrar of Titles, Selangor was not able to confirm with certainty who had collected the new land title deed was indeed very telling. That was the basis for the claim for contribution from the Registrar of Titles, Selangor.

[35] In the circumstances, we reiterate our conclusion that, it is sufficient and proper, that the Registrar of Titles, Selangor be named and cited as was done by the plaintiff in this case. As such, we find no merit in the preliminary point raised by the learned ALA and we therefore hold it as unsustainable. The preliminary point is therefore dismissed.

The First And Second Defendants' Appeal (B-01(NCVC)(W)-56-02-2015)

Whether The First and Second Defendants Acquired An Indefeasible Title?

[36] Learned counsel for the first and second defendants in his written submission contended that the first and second defendants are *bona fide* purchasers as they were not involved in the forgery of the plaintiff's signature and *ad volarem* stamp. As such, they had obtained good title for the land they had purchased from the fake 'Tho Siew Wah'. Learned counsel submitted that the first and second defendants had obtained an indefeasible title to the land.

[37] The learned trial judge did not agree with his submissions in the court below. The learned trial judge referred to the Federal Court case of *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269 which held that on immediate purchaser of a title obtained fraudulently or through a void or insufficient

instrument does not acquire an indefeasible title. (See s. 340(2)(b) of the NLC). In the instance case, the first and second defendants are the immediate purchasers. As such their title is defeasible and is liable to be set aside by the original owner.

[38] Therefore, the issue of the first and second defendants being *bona fide* purchasers is irrelevant. As long as the registration pursuant to the immediate purchase of the land was obtained through forgery or the use of a void or insufficient instrument, no indefeasibility of title is conferred by law under the NLC, whether or not the purchasers were privy to the vitiating acts mentioned under s. 340(2) of the NLC.

[39] The learned trial judge had said at para. 14 in his grounds of judgment as follows:

> 14 Malah mengikut keterangan plaintif (SP5) (di muka surat 62 QA 27 Nota Keterangan) salinan kad pengenalan atas nama Tho Siew Wah yang disertakan bersama Borang 14A bertarikh 21.6.2011 bukan milik beliau dan gambar perempuan yang tertera di kad pengenalan tersebut juga bukan gambar beliau. Kad pengenalan milik beliau dikemukakan dan ditandakan sebagai Exhibit P33. Justeru itu berdasarkan fakta ini serta memandangkan bahawa keterangan SP4 dan SP6 tidak disoal balas maka adalah satu fakta yang tidak dinafikan bahawa tandatangan Tho Siew Wah yang terdapat pada Borang 14A bertarikh 21.6.2011 adalah bukan tandatangan plaintif dan jelas telah dipalsukan.

[40] Based on that finding, the form 14A was therefore a void instrument and as such, the learned trial judge concluded that the registration of the names on the register of titles in relation to the land belonging to the plaintiff was bad in law. With respect, we agree with the finding of the learned trial judge. We therefore dismiss the appeal of the first and second defendants against the plaintiff. We affirm the order of the learned High Court Judge for their names to be cancelled from the land title of the plaintiff.

Whether The First and Second Defendants Are Entitled To Claim Contribution And/or Indemnity From The Registrar Of Titles, Selangor?

[41] Turning to the issue whether the first and second defendants can claim contribution and/or indemnity from the Registrar of Titles, Selangor, the claim can be found at p. 81 jilid 1 rekod rayuan (bahagian A) which reads as follows:

> Tuntutan Defendan Pertama dan Defendan Kedua Terhadap Defendan Keempat
>
> Defendant Pertama dan Defendan Kedua menuntut daripada Defendan Keempat yang berikut:
>
> (1) Bahawa kedua-dua Defendan Pertama dan Defendan Kedua ditanggung rugi sepenuhnya bagi semua kehilangan yang dialami oleh Defendan Pertama dan Defendan Kedua dan ganti rugi yang mungkin diawardkan oleh Mahkamah terhadap Defendan Pertama

dan Defendan Kedua sekiranya hakmilik Hartanah tersebut di bawah No Hakmilik 100855, Lot No.8591 berpihak kepada Defendan Pertama dan Defendan Kedua diperintahkan batal dan tidak sah;

(2) Semua kos yang mungkin diarahkan untuk dibayar oleh Defendan Pertama dan Defendan Kedua untuk prosiding ini;

(3) Semua perbelanjaan (termasuk yuran guaman atas dasar peguamcara dan anakguam), pembayaran dan jumlah sedemikian seperti yang mungkin dibelanjakan/digunakan oleh Defendan Pertama dan Defendan Kedua dalam prosiding ini; dan

(4) Relif-relif lain yang difikirkan suaimanfaat dan wajar oleh Mahkamah Yang Mulia ini.

[42] We noted that this matter on contribution/indemnity was summarily dismissed by the learned trial judge, as can be seen in para. 32 of his grounds of judgment. We reproduce that paragraph:

> 32 Jelas daripada fakta dan kesimpulan mahkamah ini bahawa defendan pertama dan defendan kedua serta defendan ketiga **bukanlah pembeli yang membeli tanah tersebut dengan suci hati**. Oleh itu tiada asas untuk mahkamah ini membenarkan permohonan defendan pertama dan defendan kedua serta defendan ketiga untuk defendan keempat menyumbang atau menanggung rugi atas apa-apa kerugian yang dialami oleh mereka. (emphasis added.)

[43] The learned High Court Judge appeared to be of the view that as the first, second, and third defendants were not *bona fide* purchasers for value, there was therefore no proper basis for the court to allow their respective claims for contribution as per their notices for contribution/indemnity against the Registrar of Titles, Selangor. However, it is our view that the learned judge erred in conflating the proviso to s. 340(3) of the NLC with the issue of whether the first and second defendants had acted dishonestly or illegally in procuring the title to the land in their names without having paid the full purchase price. The finding of the judge in relation to the third defendant will be dealt with later on in the judgment.

[44] It now falls to be considered whether the first and second defendants' conduct leading to the registration of their names in the Land Registry at the Gombak Land Office was proper or dishonest?

[45] Before we can conclude on the propriety of their conduct, we would have to look at the evidence led before the learned trial judge. The evidence of Tho Siew Wah (SP5) and her husband (SP1) was essentially a denial of any knowledge of any dealings that had been going on in relation to the land, until they did a land search after feeling suspicious that some unsolicited persons had been coming to view their land. The NRIC of Tho Siew Wah had been forged whereby the image on the NRIC did not belong to her.

Evidence of the officer from the National Registration Department confirmed that Tho Siew Wah, the plaintiff, had never applied for a new IC and that the version which she had in her possession was the authoritative one at all material times. Their evidence also adverted to the fact that the plaintiff had never sold the land in question to anybody for any amount. Neither had she received any payment of RM4.5 million being the purported price of the land. Lastly, both SP1 and SP5 had never met the first and second defendants, let alone sold the land to them. Neither did they appoint the legal firm of K Kulasekar, Achan and Associates that had purportedly acted on their instructions.

[46] Now, what did the first and second defendants say in evidence? The second defendant, Mohamed Zawawi bin Abdullah did not attend any of the court's proceedings pertaining to this case. As for Cheah Tai Seng, the first defendant, he admitted in court that he only applied for RM2.25 million from Malayan Banking Bhd (the third defendant) to purportedly pay for the balance of the purchase price for the land. He did pay the monthly instalments for the loan for a good few months until the scam was discovered. He however, admitted that he did not pay for the balance of the other half of the purchase price for the land. Neither did he pay the deposit of RM450,000 being the 10% deposit to the plaintiff. Similarly, neither did the second defendant pay the above amounts that were outstanding in relation to the purchase price and the deposit.

[47] In these circumstances, how could they fill in the form 14A that pertained to the transfer of the land title into their names, when in fact they did not pay the full amount of RM4.5 million which was declared as having been received in the form 14A? In such circumstances, that form 14A was void.

[48] As such, the learned High Court Judge was correct in deciding the way he did, in that, the title to the plaintiff's land that was registered in their respective names was defeasible on account of s. 340(2) of the NLC. It does not matter whether that they were not privy to the forgery because they are immediate purchaser, therefore not protected under the proviso to s. 340(3). As for their claim against the respondent contributory/indemnity, their conduct had shown that their involvement was more than that. To our minds, the conduct of the first and second defendants, as could be gleaned from the evidence led in court, including that of the investigating officer and the lawyer acting for the third defendant, showed that they had been involved in acts that bordered on illegality. Such being the case, can they come to court for relief from the Registrar of Titles, Selangor for the contribution/indemnity?

[49] With respect, the Latin maxim of *ex turpi causa non oritur actio* would apply to deny the first and second defendants of any remedy from the courts. That maxim means that one who knowingly engages in an illegal activity may not profit from it. Under the common law, that maxim first found

judicial expression in the case of *Holman v. Johnson* (1775) 1 Cowp 341 where Lord Mansfield had famously said that the court will not lend its hand to a man who found his cause of action on immoral or illegal act.

[50] Applying the maxim *ex turpi causa* to the facts in the appeal involving the first and second defendants, they had been directly involved in the signing of the form 14A (exh. D79) that stated that the purchase price for the land had been fully paid when in fact they had not done so. That clearly exposed their illegal conduct, which would disqualify them from obtaining any relief in the form of a contribution or indemnity from the Registrar of Titles, Selangor. As such, their appeal must be dismissed with costs.

[51] In the result, their names must be deleted from the register of titles and the name of the plaintiff should be reinstated on the same land title. The maxim of *ex turpi causa* applies against the first and second defendants such that their claim for contribution or indemnity against the Registrar of Titles, Selangor cannot be sustained.

The Third Defendant's (The Bank) Appeal (B-01(NCVC)(W)-82-03-2015)

Was The Third Defendant As A Subsequent Purchaser, A Bona Fide Purchaser For Value Without Notice?

[52] The plaintiff claimed against the third defendant for the latter's charge over her land to be cancelled as it was void. She had succeeded in her claim against the third defendant as evidenced in the order of the High Court. The High Court had also dismissed the third defendant's notice for contribution or indemnity against the Registrar of Titles, Selangor.

[53] Learned counsel for the third defendant submitted before us that the title of the purchasers, namely the first and second defendants, to the land was not void as the issuance of the new title was a continuation of the old title due to a re-delineation of boundary exercise. The new title was still issued in the name of the plaintiff, and not that of a third party or a non-existent entity. We refer to this as the "first contention of the third defendant".

[54] Another issue raised by the third defendant was that since it is the subsequent holder of interest in the land, in law, its interest is indefeasible provided it could establish that it fell within the proviso to s. 340(3) of the NLC. The third defendant contended that it was a *bona fide* purchaser for value when it became the chargee over the land for the loan it had extended to the first and second defendants to part-finance to purchase the land. This is the "second contention of the third defendant".

[55] As regards the first contention, with respect, such a contention completely misses the point. It would not matter whether the new title to the land was valid as being a continuation of a validly issued title to the plaintiff. What would, and does matter, is the manner in which the first and second defendants being the immediate purchasers of the land, had come by the title to the land, purportedly from the plaintiff. If the first and second defendants had obtained it under circumstances envisaged under s. 340(2)(b) of the NLC, they could not obtain an indefeasible title over the land regardless of the legal status of the land title. The evidence in this case had established beyond dispute that forgery of the plaintiff's NRIC was involved in the immediate transaction between the fraudster and the first and second defendants. Subsequently, the third defendant came into the picture when it granted a bridging term loan to the first and second defendants thereby creating a charge over the land in its favour. Clearly therefore, the third defendant was dealing with the first and second defendants as immediate purchasers, not with the plaintiff. It is also clear that the first and second defendants had no good title in the land in question. On that account, we see no merit in the first contention of the third defendant.

[56] As regards the second contention of the third defendant, the ultimate conclusion would depend on the facts surrounding the subsequent transaction on the land between the third defendant and the purchasers, namely between the first and second defendants.

[57] The governing legal principle relating to such a transaction between the third defendant and the first and second defendants as in this appeal is contained in the proviso to s. 340(3) of the NLC (the proviso). The effect of the proviso has been the subject-matter of numerous court cases. The Federal Court decision in the case of *Tan Ying Hong* case (*supra*) has finally put to rest what that proviso actually states and entails. It also means that the proviso, as it is worded, operates within the parameters of the sub-section where it resides and does not migrate to affect other areas of the same s. 340 of the NLC. So, what the proviso means is that a subsequent purchaser of a piece of land gets indefeasible title over the land if he purchases that piece of land *bona fide* or in good faith for value, even if it is subsequently discovered that the title he had purchased was in fact void. If it involves an interest, as in a charge, then the principle applies *mutatis mutandis*. The proviso to s. 340(3) of the NLC creates a unique regime that gives legislative protection to a subsequent purchaser provided he fulfils the requirements pertaining to the *bona fides* of his purchase of the otherwise void title. The surrounding circumstances of the third defendant's subsequent creation of the charge over the purchasers' land on account of the bridging term loan would have to be scrutinised before it can rely on the proviso to s. 340(3) of the NLC and be accorded indefeasibility as to its charge.

[58] The learned trial judge in the High Court had ruled that the third defendant was not a *bona fide* holder of the interest, *to wit*, the charge, over the land. He had outlined his reasons for having ruled as such. His reasons as set out in his grounds of judgment are:

> 24 Berdasarkan fakta kes dihadapan mahkamah ini, adalah jelas bahawa kedua-dua dokumen 14A dan 16A telah didaftarkan pada masa yang sama iaitu pada 28.7.2011 @ 2.07 pm (P36 ms 42 dan 52 Ikatan Dokumen C). Selain daripada itu adalah juga fakta bahawa Borang 14A selain daripada tandatangan plainif dipalsukan, juga terbatal disebabkan oleh instrument yang tak sah. Oleh yang demikian, Borang 16A juga adalah terbatal disebabkan perkara yang sama dan boleh diketepikan.
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> 29… Meneliti kepada fakta sepertimana juga dibangkitkan oleh peguam plaintif terdapat beberapa perkara yang meragukan berlaku akibat tindakan daripada pihak defendan ketiga.
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> 30 Pihak plaintif membeli tanah tersebut pada tahun 2005 dan tanah tersebut telah dinilai oleh Lembaga Hasil Dalam Negeri dengan nilai RM6,916,000. 00 (Exhibit P11 dan P12 ms 22 dan 23 Ikatan Dokumen C). SD2 iaitu Mohd Affandi Bin Abdullah selaku Pengurus di Unit Pemprosesan Pinjaman Berpusat, Malayan Banking Berhad memberi keterangan bahawa terdapat dua penilaian keatas tanah tersebut tetapi hanya penilaian daripada Puan Noriha Binti Harun (SD4), yang dikemukakan. SD4 menilai tanah tersebut dengan nilai RM4,500,000.00 (Exhibit D61 ms 22-32 Ikatan Dokumen D). Adalah tidak masuk akal tanah yang dinilai pada 2005 dengan nilai RM6,916,000.00 turun nilainya pada 2011 dengan nilai RM4,500,000.00 padahal tanah tersebut terletak dikawasan prima. Tiada penjelasan juga diberikan kenapa satu lagi lapuran penilaian tidak dikemukakan ke mahkamah untuk pertimbangan. Tambahan pula pihak defendan iaitu SD1 memberi keterangan bahawa beliau tidak mempunyai salinan sepenuhnya geran keatas hakmilik tanah tersebut (ms 183 Nota Keterangan dan Exhibit D55). Oleh itu tidak mungkin beliau menyerahkan sesalinan lengkap geran tanah tersebut kepada defendan ketiga semasa memohon pinjaman tersebut.
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> 31 Tambah meragukan adalah samada wujudnya firma guaman yang sebenarnya bertindak bagi pihak penjual. Che Noriati Binti Jusoh (SD4) dari firma Messrs Abdul Malik & Lawrence Tan, adalah peguam bagi pihak defendan ketiga yang mengendalikan dokumentasi pinjaman bank yang dibuat oleh defendan pertama dan kedua. Berdasarkan keterangan beliau (di OA8 di ms 228 Nota keterangan), firma beliau telah menulis surat (Exhibits D63- ms 269-270 Ikatan Dokumen C) kepada Messrs K. Kulasekar, Achan & Associate iaitu peguam kepada penjual memaklumkan bahawa defendan ketiga bersetuju untuk memberikan kemudahan pinjaman kepada defendan pertama dan kedua sejumlah RM2,250,000.00 bagi tujuan pembelian tanah tersebut. Surat tersebut dialamatkan kepada 308, 3rd Floor, Menara Majestic, No 15 Jalan Othman, 46000 Petaling Jaya dengan cara faks dan penyerahan tangan.

> Tetapi semakan dengan Bar Council Malaysia mengesahkan bahawa alamat semasa Messrs K. Kulasekar, Achan & Associates adalah di No. 2, 3/59, Jalan Aman, 46000 Petaling Jaya. Oleh itu bagaimana surat tersebut dapat diserahkan dengan tangan oleh firma Messrs Abdul Malik & Lawrence Tan kerana alamat tersebut bukan alamat berdaftar firma Messrs K. Kulasekar, Achan & Associate. Dua surat iaitu D64 (ms 43-44 Ikatan D) dan D65 (ms 45-46) yang dikatakan dari peguam penjual kepada peguam pembeli juga adalah meragukan kerana kedua-dua surat tersebut dari mata kasar nampak sama samada dari segi jenis font, size font serta chop "faxed" dan "received" walaupun dari dua firma peguam yang berlainan. Kedua-dua surat tersebut telah difakskan pada lebihkurang masa yang sama kepada firma Messrs Abdul Malik & Lawrence Tan tetapi walaupun nampak nyata perkara ini tidak membangkitkan kesangsian kepada peguam defendan ketiga untuk menyemak ketulinan transaksi ini. Dalam hal yang sedemikian, mahkamah ini mendapati defendan ketiga bukanlah boleh dikatakan sebagai pembeli *bona fide* dan dengan nilai ke atas tanah tersebut.

[59] Learned counsel for the third defendant had disagreed with the above.

[60] *Bona fide* purchaser for value as appears in s. 340 of the NLC must be considered within the context of that very section. To our mind, it means that the party that seeks to be treated as such by that provision must be a party who can show that he not only has paid for the property in question, but also that he is not complicit in any manner with the commission of the impugned acts that would render the registration bad for reasons as enumerated under s. 340(2) of the NLC, for instance, for forgery or fraud. In fact, even acts that are less blameworthy in degree, such as being careless or negligent could take away the subsequent purchaser from the protection afforded under the proviso.

[61] In the case of *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526, learned Justice Raus bin Sharif JCA (as he then was) after echoing Lindley MR in the case of *Oliver v. Hinton* [1899] Chancery Division 264, had this to say at p. 554:

> My respectful view is that a purchaser in good faith does not include a purchaser who is careless or who had been negligent.

[62] His Lordship had gone on to state that when a purchaser 'failed to take the ordinary precautions which ought to be taken in such a matter he is not entitled to the protection of the court.' (See p. 554 at para. 44.)

[63] Having said that, it now becomes incumbent on us to look at the evidence led before the learned trial judge to see whether the third defendant/bank was entitled to the protection that the proviso seeks to afford deserving subsequent unwitting purchaser for value of an otherwise bad title.

[64] In the *Au Meng Nam & Anor* case (*supra*) Justice Raus Sharif JCA (as he then was) had also stressed that it was not enough to consider the fact that the full purchase price had been paid in order to determine whether the person was a *bona fide* purchaser. The court ought to be looking as well at the other salient circumstances surrounding the transaction before any determination on his *bona fide* can be concluded. (See paras. 41 and 42 at p. 553.)

[65] In our present appeal, the third defendant had sought to contend that as a holder of the interest in the land by virtue of the charge created pursuant to the bridging term loan, it had stood in the position of a subsequent purchaser and that as it had disbursed the loan in full, it was a fit and proper party to be accorded the protection under the said proviso to s. 340(3) of the NLC.

[66] With regard to whether the third defendant was a subsequent purchaser in this case, we are with learned counsel for the third defendant in that it was indeed such a purchaser. The evidence of the witness for the Registrar of Titles, Selangor had shown that in point of time, the transfer of the title from the plaintiff to the first and second defendants had to happen first before the registration of the charge instrument involving the third defendant could be effected. In loose terms, it may be seen as being simultaneous, but in terms of real time, one cannot fail to see the time gap as shown by the sequence of events pertaining to the same. In the recent case of *Heveaplast Marketing Sdn Bhd v. See Leong Chye & Ors And Other Appeals* [2017] 2 CLJ 43 this court had occasion to consider on the same issue regarding a subsequent purchaser. Learned Justice David Wong JCA delivering the decision of the panel had stated thus:

> 44. Though the above dealings were on the same day and were done simultaneously on 22 April 2009, it cannot be disputed nor can we ignore the fact that the lodgement of the UOB's Charge could not have been created until the first step of transfer to Heveaplast had been affected. And since there was no suggestion that UOB was tainted by fraud or forgery, UOB was what you call a purchaser for good consideration and without notice. Hence for the aforesaid reasons, we find that UOB is a subsequent purchaser and protected by the shelter of deferred indefeasibility provided for under section 340 of the NLC.
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> 45. Further, we say that the fact that Heveaplast's interest being an immediate purchaser was defeasible by the See Brothers did not, in our view, affect the indefeasibility of UOB's interest. Our view is supported by two decisions of the apex court, namely *Kamarulzaman Omar & Ors v. Yakub Husin & Ors (supra)* and *Tan Ying Hong v. Tan Sian San & Ors (supra).*

[67] Having so determined that the third defendant was a subsequent purchaser, being the chargee, was it a subsequent purchaser for good consideration and without notice. In short, was it a *bona fide* subsequent purchaser in the circumstances of this case?

[68] From a perusal of the evidence led in the trial court, it has been established that the third defendant had left it entirely to its lawyers to do the preparation of the transfer and charge documents. There is nothing wrong in that, but the third defendant would be bound by what the lawyer does or does not do.

[69] Che Noriati Jusoh (SD4), the lawyer, testified that she did a land search but failed to produce the receipt of payment for doing the same. She then said that she did the land search on the same day that she was registering the transfer and charge documents at the land office. Later in re-examination by counsel for the third defendant, she told the court that she in fact did two land searches namely on 30 May 2011 and on the date of registration on 28 July 2011. No official receipts were produced as evidence of the same. It is quite difficult to accept her explanation to court that she had lost the receipts. Surely as a senior partner in her legal firm, she would have kept the receipts in the client's file for billing purposes, if not for any other ostensible reason. On top of that, it was a futile exercise to do a land search on the very same day of registration of the documents of memorandum of transfer and the charge documents.

[70] As regards the *ad volarem* stamp duty which had purportedly been paid for the transaction, as evidenced by the certificate number of payment, the witness said that it was not her duty to ascertain whether it was indeed the truth of the matter. The lawyer, SD4 (Che Noriati Jusoh) had testified that it did not occur to her that the adjudication for stamping was supposed to be done by the purchasers but in this case, it was done by K Kulasekar, Achan and Associates who were purportedly acting for the vendor. The land officer said it was not her duty too to ascertain the status of the same. The land office would accept the particulars on the documents presented for registration as correct, unless there was reason to necessitate further inquiry that had put them on notice.

[71] Then there was this seemingly uncanny coincidence that existed in the letter of Messrs. K Kulasekar, Achan and Associates (at p. 334 Common CB 2 exh. D64) and Vib and Co dated 20 June 2011 (p. 336 Common CB exh. D65) in response to the letter from SD4 dated 20 June 2011. The similarities in the size of the font, design of the stamp for the word "FAXED" and the time stamp on it, among others, pointed to a strong suspicion that these documents could have originated from the same source. Yet when asked in court, SD4 said that it did not raise any suspicion on her part.

[72] As the lawyer for the third defendant bank was the party who had submitted the documents pertaining to the registrations of the transfer and the charge to the Land Registry, it was her duty, first and foremost to check and verify the accuracy of the particulars contained in those documents,

A including the matter on the *ad volarem* stamp duty. As was led in evidence before the trial court, a simple on-line check with the Stamps and Assessment On line run by the LHDN would have revealed the true status. As it turned out, the certificate number assigned was a fake number and the *ad volarem* stamp duty had not been paid at all for the transfer. Had the lawyer
B conducted this on line check, the inevitable red flag surrounding the transaction would have been raised. The registration would have to be aborted pending further inquiry.

[73] It was also established in court that SD4 had executed the facility agreement and the charge documents on 15 June 2011 on behalf of the first
C and second defendants when the first and second defendants came to her office and signed the said documents. This was done despite the fact that she only received the confirmation from the vendor's solicitors K Kulasekar, Achan and Associates on 20 June 2011.

[74] These lapses on the part of the lawyer if taken in isolation may not be
D glaring, but taken as a whole and cumulatively, they would represent, to our minds a breach of the duty of care owed to her client. Indeed, some of these lapses were captured by the learned trial judge that led him to conclude that the third defendant was not a *bona fide* purchaser for value. The lawyer was an agent of the third defendant and what she did or omit to do would bind
E the latter. A failure by the lawyer is a failure of the third defendant. See the case of *Doshi v. Yeoh Teong Lay* [1974] 1 LNS 30; [1975] 1 MLJ 85.

[75] Premised on the above, we are of the respectful view that the third defendant was not a *bona fide* purchaser for value. As such, the charge it had created over the land was therefore void and of no effect. Consequently, it
F should be cancelled.

[76] Following the *Au Meng Nam* case (*supra*) we are of the respectful view that the third defendant was not entitled to the protection of the court. We therefore would dismiss the appeal of the third defendant relating to the High
G Court order cancelling the charge over the land. The title of the plaintiff is to be returned to her in her name free of any encumbrance, minus the charge created in favour of the third defendant.

The Third Defendant's Claim For Contribution And/Or Indemnity Against The Registrar Of Titles

H **[77]** We now deal with the third defendant's appeal on its claim for contribution and/or indemnity from the fourth defendant. That claim for contribution against the fourth defendant was contained in para. 7 of the summary of the 'third defendant's defence and claim against the fourth defendant' as follows:

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7. The 3rd Defendant claims against the 4th Defendant to be fully indemnified for all losses suffered by the 3rd Defendant and damages which may be awarded against the 3rd Defendant, in the event the 3rd Defendant's charge over the said Land under Presentation No. 76131/2011 is declared null and void, and ordered to be cancelled from the Registry of Charges. [Rekod Rayuan no. 56, Jilid 1, Bahagian A, page 109]

[78] Although we have concluded that the third defendant is not a *bona fide* purchaser, it does not follow *ipso facto* that they are precluded from making a claim for an indemnity/contribution from the Registrar of Titles on the basis of negligence. The third defendant's lawyer's negligence is insufficient to amount to illegal, unlawful or wrongful conduct falling within maxim of *lex turpi causa non oritur action*. A perusal of the evidence on record discloses that the Registrar of Titles was indeed negligent in that:

(i) it made no attempt to notify the plaintiff of the replacement of the old title with the new title which the Registrar of Titles was statutorily required to do;

(ii) it was unable to confirm the identity of the person who had collected the new title;

(iii) DW5, the Deputy Registrar of Titles in his evidence, conceded that the procedure adopted and the lack of records was negligent.

[79] In these circumstances, it appears to us that there was a total failure on the part of the Registrar of Titles, Selangor to comply with the procedure and regulation relating to the cancellation of the old title and issuance of the new title as required under s. 90 of the NLC.

[80] It is to be noted that the learned trial judge made no finding on this issue. We therefore allow the third defendant's appeal in respect of its claim for an indemnity and/or contribution against the Registrar of Titles, Selangor. Consequently, we order that this part of the claim be remitted to the High Court for the learned judge to assess damages under this head.

Conclusion

[81] In the upshot, we hereby dismiss appeals B-01(NCVC)(W)-56-02-2015 (by the first and second defendants) and allowed in part appeal B-01(NCVC)(W)-82-03-2015 (by the third defendant/the bank) with costs.

[82] As a consequential order, we order the case to be remitted to the High Court of Shah Alam for the learned judge to assess the damages for the claim of full indemnity awarded to the appellant (third defendant) against the fourth respondent (fourth defendant).

[83] In respect of costs, for appeal B-01(NCVC)(W)-56-02-2015 we order the deposit to be given to the first respondent as costs. In respect of the second respondent, we make no order as to costs.

A **[84]** While for appeal B-01(NCVC)(W)-82-03-2015, we order costs of RM7,000 to be paid by the appellant (third defendant) to the first respondent (plaintiff) and costs of RM30,000 to be paid by fourth respondent (fourth defendant) to the appellant (third defendant);

B **[85]** All payments of costs are subject to allocatur where applicable, and we also order that the deposit for B-01(NCVC)(W)-82-03-2015 appeal to be refunded to the appellant bank.

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